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No. 01-436

IN THE
Supreme Court of the United States

DONNA C. LINDAMOOD,

Petitioner,

v.

OFFICE OF THE STATE ATTORNEY,
NINTH JUDICIAL CIRCUIT OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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16 pp

QUESTIONS PRESENTED

The lengthy introduction to the questions presented in the petition is unnecessary, inappropriate, and mischaracterizes the facts upon which the questions are based. Nevertheless, as stated in the petition, the questions presented are:

I. Whether the evidentiary burden of a terminated employee to establish a mixed motive case requires the presentation of only direct evidence or whether evidence characterized as circumstantial evidence allows for the mixed motive burden shifting under *Price Waterhouse.*

II. Whether the Eleventh Circuit's approval of the district court's incorporation of this Court's opinion in *Connick v. Myers*, a 42 U.S. C. § 1983 case, into a jury instruction for a Title VII retaliation case was a sanction of a lower court's action that so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

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STATEMENT OF THE CASE

Respondent disagrees with Petitioner's statement of the case which omits many pertinent facts of record. Because the questions presented in the petition essentially challenge the sufficiency of the evidence, Respondent offers the following statement of the case in lieu of that provided by Petitioner.

Petitioner, an assistant state attorney, sued the Respondent, the Office of the State Attorney for the Ninth Judicial Circuit of Florida, for alleged violations of Title VII based upon her gender. She made three distinct claims: first, she alleged that she had been unlawfully discriminated against in salary, claiming that males were awarded greater and more frequent increases; second, she alleged that she was unlawfully assigned a disproportionate share of the workload based upon her gender; and third, she alleged that her ultimate termination was in retaliation for a charge of discrimination she filed with the EEOC and Florida Commission on Human Relations. Although the petition focuses only on a jury instruction related to the third claim, it should be noted that the case went to the jury on all three claims and the jury rendered a verdict against Petitioner on all of the claims.

As to her first claim, the evidence adduced at trial showed that Petitioner was paid more in salary than a comparable male employee. As to her second claim, the evidence at trial showed that any workload disparity which Petitioner suffered was due to reasons other than gender. As to Petitioner's third claim (retaliatory termination), the evidence adduced at trial failed to show that

the discrimination charges she filed in 1995 were a substantial factor in the adverse employment action taken against her in 1998.

Instead, the evidence adduced at trial showed that Petitioner's termination came less than 24 hours after she disseminated an e-mail to the nearly 200 employees of the State Attorney's Office which disparaged the State Attorney himself. Moreover, the evidence demonstrated a persistent pattern of disrespect and poor attitude toward other supervisors in the State Attorney's Office by Petitioner. In light of this evidence, the trial court properly rejected Petitioner's request for a "mixed motive" jury instruction based solely upon the testimony quoted in the Petition (page 8).

The jury instruction given by the district court was as follows:

> **If you decide that Plaintiff's filing of a charge of discrimination was the motivating factor for her termination, you should find for the Plaintiff. If, however, you have decided that the Defendant has demonstrated that it would have terminated the Plaintiff irrespective of the Plaintiff's filing of this charge of gender discrimination because Defendant reasonably believed that Plaintiff's actions were disruptive, would undermine authority, and destroy close working relationships, then you should find for the Defendant.**

Pet. App. at 3a. After approximately three hours of deliberation, the twelve-member jury returned a verdict in favor of Respondent on all of

Petitioner's claims which the Eleventh Circuit affirmed in the decision below.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. CERTIORARI SHOULD BE DENIED BECAUSE IRRESPECTIVE OF WHETHER THE STATE ATTORNEY'S TESTIMONY MAY BE CHARACTERIZED AS DIRECT OR CIRCUMSTANTIAL EVIDENCE, IT DOES NOT SHOW THAT AN ILLEGITIMATE FACTOR PLAYED A SUBSTANTIAL ROLE IN THE EMPLOYMENT DECISION.

A. The Failure to Satisfy Rule 10

In order for this Court to grant certiorari in this matter, Petitioner must show that the Eleventh Circuit entered a decision that: is in conflict with another United States court of appeals on the same important matter; departed from the accepted and usual course of judicial proceedings; or decided an important federal question in a way that conflicts with relevant decisions of this Court. S. Ct. Rule 10(a) and 10(c). *Magnum Import Co. v. Coty,* **262 U.S. 159, 163 (1923). The Petition fails to meet a single one of these criteria.**

The decision below turns upon its own narrow facts, and any decision of this Court would have little precedential value. Even if the petition were granted, a review of the questions presented by Petitioner would be highly unlikely to change the outcome of the case.

B. The Lack of Conflict with A Supreme Court Decision

Petitioner presents two questions for certiorari review, both raising issues with respect to the instructions to the jury. Petitioner's first question is essentially whether a title VII plaintiff may be entitled to a mixed motive instruction pursuant to *Price Waterhouse v. Hopkins*, 490 U. S. 228 (1989), based upon the presentation of either direct or circumstantial evidence. *Price Waterhouse* holds that when a plaintiff in a title VII case proves that her gender played a part in an employment decision, the defendant may avoid a finding of liability by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken plaintiff's gender into account.

Petitioner argues that the Eleventh Circuit has limited a title VII plaintiff's ability to obtain a mixed motive burden-shifting instruction by defining the evidence in question as circumstantial or indirect evidence. Petitioner simply misreads the decision of the Eleventh Circuit below.

The Eleventh Circuit did not hold, decide, or state below that a plaintiff's only way to receive a mixed motive jury instruction was through the presentation of direct evidence. The Eleventh Circuit, and the district court before it, correctly applied relevant law in determining that based upon the weight and quality of the evidence presented below, Petitioner was not entitled to the mixed motive instruction she sought. The only evidence that Petitioner relies on was the State Attorney's unsurprising acknowledgment that at

the time he terminated Petitioner's employment the two and one-half years of administrative litigation over Petitioner's EEOC complaint had "entered my thoughts." But he did not, he testified, fire her for that reason. He fired her "for [the] e-mail and as a last straw."

Even characterizing this evidence as direct (which it is not), would not have entitled Petitioner to the instruction she wants. The Eleventh Circuit did not misapply the reasoning of *Price Waterhouse*. That decision makes clear that a title VII plaintiff may be entitled to a mixed motive instruction upon the presentation of both direct and circumstantial evidence, which together can demonstrate entitlement to same. *Tyler v. Bethlehem Steele,* 958 F. 2d 1176, 1183 (2nd Cir. 1992). What matters is whether the evidence is of such weight that the respective burdens should shift. Here, Petitioner's evidence was of such small weight that the respective burdens did not shift, and she was not entitled to the mixed motive instruction sought. The Eleventh Circuit does not conflict with this Court's holding in *Price Waterhouse*.

C. The Lack of Conflict With other Circuit Decisions

Petitioner's contrived dispute as to whether the evidence in question was direct or circumstantial is not of such significant import that certiorari should be granted. When a plaintiff does not adduce evidence sufficient to warrant the mixed motive instruction, there can be no conflict with decisions of this Court or those of other circuits.

In seeking a grant of certiorari, there must be a real or "intolerable" conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized. *Layne & Bowler Corp. v. Western Well Works,* **261 U. S. 387, 392-393 (1923). The conflicts in the case law should be square and irreconcilable. Further, if the resolution of a clear conflict is irrelevant to the ultimate outcome of the particular case before the Court, certiorari may be denied.** *Sommerville v. United States*, **376 U. S. 909 (1964).**

Petitioner does not demonstrate true and irreconcilable conflict among the circuits, but only that some circuits have determined that lower district courts erred in not giving juries mixed motive instructions. In both *Ostrowski v. Atlantic Mutual Insurance*, **968 F. 2d 171 (2nd Cir. 1992), and** *Tyler v. Bethlehem Steele*, **958 F. 2d 1176 (2nd Cir. 1992), which Petitioner cites for conflict, the outcomes are easily distinguishable from the instant case in numerous ways, and are not in conflict with the Eleventh Circuit's decision.**

The amount of evidence which prompted the Ostrowski court to direct that the instruction should have been given is much greater by comparison than the scanty testimony at issue in this case. While the *Ostrowski* **court determined that the plaintiff there should have had the mixed motive instruction, it also correctly recognized that "not all evidence that is probative of discrimination will entitle the plaintiff to a** *Price Waterhouse* **charge."** *Ostrowski*, **968 F. 2d at 181.** *Ostrowski* **further noted that its holding did not mean that a mixed motive finding is possible in every discrimination case.** *Id.* **968 F. 2d at 185. It suggested as an example that an accountant**

plaintiff may establish a prima facie case that age discrimination was a motivating factor and the defendant may establish a prima facie case that the plaintiff had embezzled substantial funds. It stated that the trier of fact would have to believe one or the other, and a finding of mixed motive simply would not be possible. In such circumstances, *a Price Waterhouse charge should not be given*. *Id.* Here, the "evidence" established only that the State Attorney was aware of two and one-half years of administrative litigation when he terminated Petitioner's employment. How could he honestly have said he was not aware of that fact?

There is similar reasoning in the *Tyler* case, also a Second Circuit case, and no language indicative of any conflict whatsoever with the Eleventh Circuit's opinion herein. Interestingly, the jury instruction at issue in Tyler, is strikingly similar to the pertinent instruction in the instant case. Petitioner cannot assert, in light of her reliance on the case in her brief, that the instruction given below was not adequate or appropriate in view of the evidence.

Petitioner also relies on the case of *Griffiths v. Cigna Corporation*, 988 F. 2d 457 (3rd Cir. 1993). This case reveals no circuit conflict either. *Griffiths*, like *Ostrowski*, and following *Price Waterhouse*, considers evidence which was insufficient to demonstrate a prima facie mixed motives case. Just as the Eleventh Circuit decided here, the weight of the evidence in *Griffiths* did not warrant the mixed motive instruction. The Third Circuit's remand for a new trial in *Griffiths* was with specific instruction to the district court that it be retried as a pretext, and not a mixed motives

case.

Petitioner's other citations presented in support of circuit conflict are likewise either misread or exaggerated. For example, Petitioner claims, at page 10 of her brief, that *White v. Federal Express*, 939 F. 2d 157 (4th Cir. 1991), holds that a burden shifting mixed motive case could occur provided, "a plaintiff may carry its burden under ordinary principles of proof by any sufficiently probative direct or indirect evidence." While this rationale is certainly evident in *Price Waterhouse*, the quoted statement was not the holding in *White* at all. *White*, moreover, requires that a plaintiff prove that an employer's motive to discriminate was a "substantial factor" in the personnel action taken. Petitioner's evidence simply did not rise to that level.

In sum, the cases Petitioners relies upon do not show a degree of conflict, if they show any at all, that would warrant a grant of certiorari.

II. THE ELEVENTH CIRCUIT DID NOT SANCTION A DEPARTURE FROM THE "ACCEPTED AND ORDINARY COURSE OF JUDICIAL PROCEEDINGS."

Petitioner contends that the Eleventh Circuit departed from the "accepted and ordinary course of judicial proceedings" when it determined that the district court did not commit reversible error by giving a jury instruction based in part upon *Connick v. Myers*, 461 U.S. 138 (1983). Pet. at 18. The essence of Petitioner's argument is that *Connick* is a First Amendment (free speech) case "that should not have been incorporated into this

employment, Title VII retaliation case." Pet. at 19-20. Petitioner is incorrect.

First and foremost, the district court is entitled to broad discretion in formulating jury instructions so long as the instruction "considered as a whole . . . 'sufficiently instructed the jury so that the jurors understood the issues and were not misled.'" Pet. App. at 6a (citation omitted). The district court did not abuse its discretion, and certainly did not depart from the "accepted and ordinary course of judicial proceedings" by giving the instruction at issue in this case. Nor did the Eleventh Circuit do so when it found no reversible error based upon that instruction.

Second, *Connick* was a First Amendment employment case involving an assistant district attorney. The principle from that case incorporated into the jury instruction is not extraordinary in a Title VII case: an employer, even a public employer, has an interest in the management of its personnel and internal affairs and may protect that interest by removing employees whose conduct is disruptive, hinders efficient operation, or adversely affects discipline and morale in the work place. *See Connick*, 461 U.S. at 151 (quoting *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring)).

Finally, the jury instruction conformed to the evidence which was presented by both sides at trial, first by Petitioner, and then through lengthy testimony by Respondent's witnesses to which there was no objection. Accordingly (and despite her argument to the contrary in the Petition (pages 19-20)), Petitioner has waived any objection to the district court's incorporation of *Connick* into the

jury instruction.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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